

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

HOSPITAL MENONITA DE GUAYAMA,
INC.

and

UNIDAD LABORAL DE ENFERMERAS
(OS) Y EMPLEADOS DE LA SALUD

Cases: 12-CA-214830, 12-CA-214908,
12-CA-215039, 12-CA-215040,
12-CA-215665, 12-CA-217862,
12-CA-218260, 12-CA-221108

**Respondent's Answering Brief in Opposition to General
Counsel's Cross-Exceptions**

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INTRODUCTION

The thrust of the GC's exceptions relies on alternative arguments because the complaint, the issues litigated before the ALJ, and the ALJ decision itself do not reach as far the GC would stretch them. The GC does not contest that at all relevant times the Union lacked majority support. Its argument is subsidiary. It contends that despite overwhelming evidence of lack of Union support, "the withdrawals of recognition were unlawful because they occurred at times when significant unremedied unfair labor practices existed." GC, 6. These, according to the GC, created an overall "environment of bad faith" that as early as February 5, 2018 led the employees to withdraw Union support, first the Technicians Unit (Unit D), and then in the rest of the other four units represented by the Union. As argued in more detail in our prior writings, the problem with this argument is that it overreaches, for the record, examined in context, simply does not support the degree of deliberate and intentional breach of the bargaining duty alleged by the GC.

First, the GC omits mentioning that when the Respondent Hospital, as a successor, complied with its duty under law when it first acquired the Hospital. As recognized by the ALJ, "when the Respondent offered employment to San Lucas employees represented by the Union, simultaneously set out the new benefits it would be offering them. Therefore, these employees were aware of the changes when they became the Respondent's employees. This, allowed under *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972) and *Walden Security Inc*, 366 NLRN No. 44 (2018), led the ALJ to conclude that "respondent did not violate the Act by setting initial [...] terms and conditions of employment for unit employees." ALJD, 10.

The Board should note that while the charge filed by the Union on October 26, 2017, (12-CA-210321) alleges failure to bargain in good faith from September 13 onwards, it does not allege failure to recognize the Union as the collective bargaining representative of the employees

in all five Hospital units. See Respondent Exh. 13, page 5. The Board should note that it was not until January 31, 2018 that the charge was dismissed. Accordingly, during this period the proper reading of this dismissal is that the evidence on the record did not allow the inference, suggested here by the GC, that the Respondent failed to recognize or bargain with the Union in violation of the Act. **JE:22.**

As a factual matter, the only three incidents on which the GC premises her “environment of bad faith” prior to the withdrawal of Union recognition are: (a) the 12-hour shift for the RNs; (b) the Hurricane María gift; and (c) the alleged delay in recognizing the Union.

As to the RN’s shift, the Respondents abundantly deconstruct this claim in the Brief in Support of Respondent’s Exceptions and the Respondent’s Reply brief. In his decision, the ALJ refused to amend the complaint and did not use any evidence concerning this matter even to shed light on the true characters of the underlying charge. Under these circumstances, the GC’s claim that these matters are part and parcel of preexisting significant unremedied unfair labor practices simply has no weight.

With respect to the alleged bonus issue, once again we direct the Board’s attention to the Respondent’s prior briefs where we referred to the relevant criteria for distinguishing between a compensation and a gift. Thereafter, we underscored the evidence in favor of the proposition that the distinction awarded to certain unit employees, among many other non-union employees, was consonant with the principle that this one-time distinction was in the manner of a gift and not wages, as the term is construed under the Act. In the alternative, this solitary incident is not the type of pervasive Respondent behavior constituting a preexisting significant unremedied unfair labor practices supporting a ploy to withdraw Union recognition.

Finally, the GC's argument that the Respondent's engaged in an intentional delay to undermine the Union is simply grounded on broad misrepresentations of the factual record. The more obvious claim is that the Respondent "overlooked" the Union attempts at bargaining. The GC here is guilty of many omissions, particularly the lack of context in which she describes the parties difficulty in communicating with each other in light of the effects of Hurricane María upon the parties schedules and text. Look for example, the Union's text of October 12, barely 3 weeks in the midst of the destruction caused by Maria, where the Union representative recognized the Respondent's recognition of the Union and requested to meet. The Respondent's immediately agreed to said request, gave him the meeting date (October 16), and although he agreed to confer, he never showed up. This happened on more than one occasion. See JX:14. It is no surprise, therefore, that the ALJD rejected the GC's argument, not only because it was not alleged in the complaint, but also because the Respondent's conduct "should [not] be considered as reflecting on the Respondent's pattern of conduct." To finish the point of, we note once again that the Union's charge for breach of the duty to bargain for reason of the modification in the employees benefits was dismissed by the Region. JE:22.

In light of the above evidence, it is not possible to countenance the GC's conclusory allegation that the Respondent's withdrawal of Union recognition, occurring from February onwards, happened in the midst of a bad faith environment of significant unremedied unfair labor practices.

Having shown that there was not a bad faith environment of significant unremedied unfair labor practices prior to the withdrawal of recognition, Respondent now wishes to address the GC's concession that NRLB's successor bar doctrine, articulated in *UGL-UNICCO*, 357

N.L.R.B. 801 (2011), should be overruled, a position advanced by Respondent. Respondent notes, to start, that all of the ALJD's finding that the Respondent engaged in unilateral changes occurred following the withdrawal of recognition. This segment of the ALJD, however, is completely premised on the application of the successor bar doctrine articulated in *UGL-UNICCO*. There, under the successor bar doctrine, the Board held where the successor has not adopted the predecessor's collective bargaining agreement a Union is entitled to a reasonable period of bargaining during which an employer may not unilaterally withdraw recognition from the Union, for a period ranging from 6 to 12 months, based on a claimed loss of majority support, whether arising before or during the period. As a consequence of this bar, the Employer cannot unilaterally change the terms of employment without good faith bargaining with the Union during the bar period. Here, applying the ruling precedent, the ALJD found that Respondent had engaged in a withdrawal of recognition and consequent implementation of a number of unilateral changes in violation of the successor bar doctrine.

Respondent contends, however, that insofar as *UGL-UNICCO* no longer represent an adequate balance of the employee's Section 7 rights under the Act, that the successor bar doctrine should be overruled. If it were overruled by this Board, the GC suggests that the Board should return to the ruling of *MV Transportation*, 337 NLRB 770 (2002) under which the irrebuttable presumption of majority Union support of *UGL-UNICCO* would give way to a lesser rebuttable presumption of Union support. If the Employer could demonstrate the withdrawal of employee support, the Employer would be free to implement unilateral modifications to the employees benefits, as it did here. If so, the ALJD would be bereft of legal support.

Here, the Respondents submitted clear evidence showing that at all relevant times the majority of employees in each of the five bargaining units no longer supported the Union. While the ALJ, given the bar, did not allow said evidence to be introduced at the hearing, the Respondent did take the precaution of making the necessary and sufficient offer of proof to demonstrate its case. See TR 119-218. If allowed, Respondent would have demonstrated that in the absence of demonstrable majority support for the Union, the Respondent did not engage in a violation of the duty to bargain.

Aside from the GC's concocted argument of a bad faith environment prior to the withdrawal of recognition, there is no other evidentiary evidence showing that the Respondent engaged in a breach of a duty to bargain. In addition, all other unfair labor practices identified by the ALJD as breaching the Act, do so not because they occurred prior to the loss of majority support, but simply because the dogmatic application of the successor bar. Aside from the incidents prior to January 2018 that Respondent has debunked, there are no other incidents of substance that are contrary to the Act. These claims of ULPs and subsequent unilateral changes are either contradicted by the evidence, or isolated and insufficient instances that in themselves are unable to disavow the bonafide withdrawal of recognition after a majority of employees expressed their Section 7 rights to not be represented.

The GC cannot have it both way. It wishes now to argue in the alternative that should this Honorable Board overrule the successor bar, there is sufficient evidence to show that the Respondent committed unfair labor practices by the unilateral changes as to the terms and conditions of employment. During the hearing, however, the GC was adamant in not allowing the Respondent to submit evidence to the contrary. To find for the GC in the alternative, when it

prevailed in blocking all the Respondent's evidence to the contrary, would result in a grievous breach of Respondent's due process rights. Here, the GC argued and the ALJ found that evidence of loss of Union support would not be allowed to be presented by the Respondent because it was irrelevant under the successor bar doctrine for under said bar the Union enjoyed an absolute presumption of employee support during the successor bar period. Under these circumstances, any evidence of loss of Union support is simply irrelevant; consequently, any unilateral change adopted by the respondent would inevitably constitute an unfair labor practice.

If the successor bar doctrine is overruled, however, this result would not be inevitable. Once the absolute presumption of employee support withers away, withdrawal of Union recognition would depend on whether the Respondent could present evidence enough to show a bona fide loss of Union support. If said evidence was marshalled in court, under the prevailing Board doctrine the Respondent could lawfully effectuate unilateral changes in the subject matters of bargaining. Arguably, all the changes effectuated by Respondent following the loss of Union majority would be allowable under the Act.

The GC claims, nonetheless, that the unilateral changes implemented by the Respondent were unlawful because in any event the Respondent did not rebut the presumption of Union majority or that the loss of Union majority occurred amidst an atmosphere of bad faith bargaining: in the "midst of a myriad unfair labor practices which to date remained unremedied." GC;11. Neither claims stands scrutiny. As to the loss of Union majority, the GC objected to the presentation of said evidence. TR: 211-213. The Respondent's evidence, however, would surely have sufficed to reverse the rebuttable presumption of majority status and to render lawful the unilateral changes. The failure to let Respondent to present said evidence and defeat the

presumption of majority support as well as the charges of unilateral changes in the terms and conditions of employment is a violation of Respondent's due process rights to present evidence adverse to the GC. The ALJD findings and the GC's exception in this regard cannot be obtained in violation of Respondent's constitutional right to present evidence in support of its defense. See *NLRB v. Johnson*, 322 F.2d 216 (6th Cir. 1963)(violation of due process when an employer is not allowed to litigate fully his defense); *NLRB v. H.E. Fletcher Co.*, 298 F.2d 594 (1962)(where the Board improperly makes its finding on a charge not contained in the complaint, and the record discloses that the basis of this finding has not been litigated at the hearing, such finding is not entitled to enforcement).

Finally, the GC's last argument, that there existed an atmosphere of bad faith bargaining prior to the withdrawal of Union recognition is also hollow. The Union filed a charge of bad faith bargaining that was dismissed by the Region. The record shows, furthermore, that the Union itself claimed the contrary, stating that it had been recognized by Respondent; and the Union itself, attested to the several attempts to confer with the Respondent, attempt which the GC typically fails to mention did not work out due to the Union's failure to assist the planned meetings. JE:14. The only real controversy is whether the gift given to the Respondent's employees, Union and non-Union alike, for staying at the Hospital the night Hurricane María passed over Puerto Rico is a wage or not under the Act. Respondent has argued that the case law clearly sides with the Respondent's reading of the event; and that, in any event, said gift, in isolation, fails to make out the discriminatory atmosphere postulated by the GC to discredit the Union's loss of majority support. In sum, despite all of its sound and fury, the GC's rhetoric signifies nothing, compared to the facts distributed throughout the record.

I. ARGUMENT

A. Respondent concedes that the Administrative Law Judge erred by committing several inadvertent errors, but not all pointed by the GC. Respondent opposes Cross-Exceptions 3 and 7 as inadvertent errors.

GC contends in Cross-Exceptions 2, 3, 5, 6, 7 and 8, that the ALJ erred by committing several Inadvertent errors. Respondent agrees with GC's Cross Exceptions 2, 5, 6 and 8. That is, that the ALJ erred when he referred "to Respondent's Predecessor as "San Luis" instead of "San Lucas" on page 5 of the Decision"; [ALJD 5:15-16]; when he "found that the documents requested by the Union on March 14, 2018 concerned a meeting held with unit employees on March 4, 2018, instead of on March 14, 2018" [JX 1, page 1, paragraph 75; JX 55];" and when the ALJ found "that Respondent instituted 12-hour shifts for RNs since on or about June 12, 2018, instead of since on or about June 17, 2018. [ALJD 13:38]." Last, it appears that one of the remedies sought as appropriate by the ALJ was not formally ordered, as discussed by the GC in Cross-Exception 8. That may not have been an error, though, for it would most definitely adversely affect the employees.

Respondent opposes, however, the substance or premise of GC's Cross-Exception 3 and its categorization as a mere "inadvertent error." The same goes for Cross-Exception 7.

In Cross-Exception number 3, the GC argues that the "ALJ correctly found that it was not until November 6, 2017 when Respondent recognized the Union" and that, consequently, erred when concluding that "two of the alleged unilateral changes occurred when the Respondent still recognized the Union for the units involved." (ALJD 11: 37-38). Although the alleged unilateral changes are not mentioned, we believe, as the GC does, that the ALJ was referring to the imputed September-October 2017 change in work shifts for the RNs and the November 2017

“Hurricane Bonus.” The GC contends that the ALJ should have stated that only “one” unilateral change occurred while Respondent recognized the Union, because, supposedly, Respondent did not recognize the Union until November 6, 2017 and, therefore, the September-October shift change could not have been considered as having occurred while Respondent recognized the Union. We agree with the GC in the sense that the ALJ erred when he stated that “two” of the alleged unilateral changes occurred when the Respondent still recognized the Union, but for entirely different reasons.

We contend that the ALJ erred when he expressed that “two” of the alleged unilateral changes occurred when the Respondent still recognized the Union because the “two” events apparently referred to by the ALJ were incorrectly determined to be unilateral changes. In our Exceptions to the Decision of the ALJ, we demonstrated that neither the September-October 2017 change in work shifts for the RNs nor the November 2017 Hurricane Payment amounted to a violation of the Act. As explained in our Brief in support, the September-October 2017 change in work shifts for the RNs was found by the ALJ not to “form the basis for finding an unfair labor practice.” (ALJD 12: 33-34). Consequently, the ALJ erred when he counted that event as one of the “two” unilateral changes. The November Hurricane Payment wasn’t a violation either and hence the ALJ should have not counted it as a unilateral change, for the so called “bonus” was a gift, unrelated to the employee’s wages. See, *“Brief in Support of Respondent Exceptions to ALJ Decision Issued on May 30, 2019.”*

Where we disagree with the GC, is with the assertion that during that period of time: September-October 2017, the Hospital had not recognized the Union and that it did not do so until November 6, 2017.

Respondent recognized the Union as the representative of all the bargaining units sometime during the end of September to first week of October 2017. So, we do agree with the part of the ALJD in which he considers that the Hospital had recognized the Union by September-October 2017. The evidence –which the GC inexplicably ignores—is clear and conclusive on this fact and is found in Joint Exhibit 14 and stipulated facts 42 and 43 of Joint Exhibit 1. Joint Exhibit 14 are printed copies of the text messages exchanged between Respondent’s Human Resources Director, Mrs. Rodríguez, and Mr. Echevarría, the Union’s representative. A simple review of the first four pages reveal that as early as September 15, 2017, Union representative Mr. Echevarría and Respondent’s Human Resources Director were communicating and discussing matters related to unionized employees. But more important and conclusively, on October 12, 2017, Mr. Echevarría wrote to Respondent’s HRD and stated: “Given the Union Recognition by Hosp. Menonita Guayama I need dates for us to sit down and talk accordingly. Thanks!!!” (Jt. Exh. 14, p 5). So, by no later than October 12, 2017, Respondent had already recognized the Union and the Union had acknowledge the recognition. GC omits mentioning this central piece of evidence. It also omits the fact that after that date, Respondent’s HRD scheduled a meeting for October 16 with Mr. Echevarría to discuss the Union’s position regarding a proposed change in the work shifts of the employees in the RN Unit from 8 to 12 hours. That meeting was however rescheduled in two occasions (October 16 and 20) because Union representative Mr. Echevarría failed to show up. The meeting was eventually held on October 27 and there, Respondent and the Union discussed the 12-hour shift proposal for the RNs. Respondent’s HRD also asked Union representative to submit their collective bargaining proposal in writing when Mr. Echevarría asked her to reinstate the terms of the

collective bargaining agreement under San Lucas. See, Stipulated fact 43, 47 and Jt. Exhs. 17 and 18. Although no agreement was reached, the undeniable fact is that by that date Respondent was meeting with Union representatives because it recognized them as the representative of all the contracting units. If Respondent had not recognized the Union by early to mid-October, its HRD would have never met with Union representative as it did and discussed the matters they discussed.

The GC's statement that the ALJ "correctly found that it was not until November 6, 2017 when Respondent recognized the Union" is thus incorrect. First, it is inconsistent with the language used by the ALJ in its Decision. What the ALJ stated was that "[o]n November 6, Rodríguez advised Echevarría that all of the employees who worked for San Lucas had accepted the Respondent's employment offer, and that the Respondent was recognizing the Union as the exclusive representative of employees in all units (JT Exh. 17)." This is far from the "it was not until" construction of the GC, particularly when everyone understood that the November 6 letter was just the formal relay of what had been verbally communicated to the Union during the last week of September or first of October 2017. Second, the GC unforgivingly downplays the effects that Hurricane Irma and María had in the Island and people's ability to simply communicate by phone, as well as the initial difficulties Hospital Menonita confronted when it took over San Lucas. An example of the latter is found in Exhibit 14, text from Mr. Echevarría to Mrs. Rodríguez in which he questions why payment to employees was not issued on September 15. Jt. Exh. 14, p. 1. As to the former, Exhibit 14 is also telling. In text of October 9 (Jt. Exh. 14, p. 3), Mrs. Rodríguez informs Mr. Echevarría that she is unable to communicate through calls and asks that text messages be sent instead. All of this demonstrates that if there

were any delays in recognizing the Union, it was due primarily to the effects Hurricane María, not any preconceived strategy or attitude towards the Union. As such, it is unfitting for the GC to express as a premise that it was not until November 6, 2017 that Respondent Recognized the Union. The Hospital recognized the Union as the representative of all the bargaining units sometime during the end of September to first week of October 2017.

Also, the GC misleads when at page 3 of its Brief in Support states that “[a]s a matter of fact, the ALJ found (and the parties stipulated) that on September 18 and 19, and on October 4 and 13, 2017, Respondent sent letters to the Union stating that it still needed to determine whether the Union represented a majority of employees before it recognized the Union.” That is simply incorrect. Only in one occasion did Respondent write to the Union to inform that it still needed to determine whether the Union represented a majority of employees. And that was on September 18, 2007, practically one day before Hurricane María struck the Island. See, Jt. Exh. 13. Never again did Respondent write to the Union to communicate or reiterate that it still needed to determine whether the Union represented a majority of employees. There are no other letters in evidence to support the GC’s representation. What happened was that because of Hurricane María and its effects on communications, the Union never received the September 18 letter, and so, Mr. Echevarría requested that it be re-sent so he could have a copy. This is what the parties stipulated, not what the GC states. See, Stipulation 39 (Jt. Exh. 1) and page 4 of Jt. Exh. 14. So, there was only one letter, not several like the GC misleadingly represents. The other dates (September 19 and October 4) are the dates during which Respondent tried to re-send the letter as requested. In sum, what the record shows is that the Hospital recognized the Union as the representative of all the contracting units by no later the last week of September or first

week of October. And any purported delays were the result of Hurricane María. Plus, the GC did not present any evidence –and neither did it alleged—that there was a delay in recognizing the Union. GC failure to allege such a delay was one of the determinations of the ALJ. See, ALJD 12: 39-41.

We turn now to Cross-Exception 7. In Cross-Exception 7, the GC argues that the ALJ erred by inadvertently failing to specify that Respondent's failure to meet and bargain in good faith started since or about February 7, 2018. This was no inadvertent error. First, Respondent has challenged the ALJ's conclusion that it failed to meet and bargain in good faith with the Union. See, Respondent's "*Brief in Support of Respondent Exceptions to ALJ Decision Issued on May 30, 2019*", at pages 29 through 40. We reiterate those arguments and adopt them by reference as if herein stated. GC argument that Respondent did not address or object to the ALJD cease and desist Order in 1(b) is disconnected from the record.

Nevertheless, it must be noted that Respondent asked the Union as early as October 27, 2017 to submit its proposals in order to initiate the bargaining process. That request was reiterated in writing in the November 6, 2017 letter (Jt. Exh. 17), but the Union ignored the request and did not submit its proposal until February 12, 2018, three and a half months after Respondent asked. Also, during the time the Union took to submit its proposal and delay the start of the process, Respondent continued to meet face to face with Union representatives and discuss all matters related to unionized employees that were brought to the fore. Respondent also communicated in writing with the Union on various occasions (Jt. Exh. 14, 16, 19 and 23). The GC never presented any evidence to contradict this reality. So, based on these undisputed

facts, February 7, 2018 cannot be considered as the starting point where Respondent allegedly began to refuse to meet and bargain with the Union.

Reality is Respondent never refused to meet and negotiate with the Union. For one, the Union submitted its proposal on February 12, 2018, days after GC's purported date of February 7, 2018. Second, the fact that Respondent informed the Union that it would have to revise and analyze the proposals submitted on February 12 and submit its counterproposal by the third week of April cannot under the circumstances be indicative that respondent had no intention of engaging in meaningful bargaining negotiations. (Jt. Exh. 42). Given the absence of any contemporaneous prior collective bargaining agreements between Respondent and the Union. How is then unreasonable for a new employer to take less time than the Union initially did to review what where undeniably new collective bargaining proposals? Also, when Respondent sent the February 14, 2018 letter there were three bargaining units recognized and therefore it was reasonable for the Employer to take time to revise and analyze those three collective bargaining agreement proposals. More so when the Union took almost double the time (three and a half months) to prepare and present their proposals. Last, and not least important, the Respondent complied with the timeline, by submitting its counterproposal as represented. If Respondent's intentions were not to negotiate, it would have never taken the time to analyze the proposals and submit, as promised, a counter proposal. Plus, the GC did not present any evidence and the ALJ did not find that the amount of time that the Respondent took to review and analyze the Union's proposals and prepare its proposals constituted an unfair labor practice or that it should reflect on the Respondent pattern of conduct. ALJ 12: 39. A so called pattern of conduct cannot be based on "a strong suspicion."

B. The Administrative Law Judge acted correctly when it rejected the GC's attempt at having the expressed will of the Hospital's employees ignored on the basis of theories other than the successor bar.

- i. The ALJ acted correctly when it did not consider whether Respondent's withdrawals of recognition were unlawful because they occurred at times when significant unremedied labor practices existed (Cross-Exception 1)

The GC's position throughout the trial was that the successor bar doctrine prevented Respondent from withdrawing recognition of the Union, despite having received objective evidence that the employees did not want to be represented by the Union any longer. That was the basis for opposing Respondent's evidence. Indeed, in its opening statement, the GC stated: "Counsel for the General Counsel will also argue that Respondent's withdrawal of recognition came at a time when the Union enjoyed an irrefutable presumption of majority status and when the parties had not even begun negotiations for initial collective bargaining agreement". (Tr. 32 Line 19-24).

Now, in an about face, the GC conveniently abandons the position it so hard fought to sustain and asks that the presumption established in *Lee Lumber & Bldg. Material Corp.*, 322 NLEB 175 (1996) be imposed upon Respondent. Worst, it pretends that this Board rule that Respondent failed to refute the presumption, despite never having been notified of it. Such pretensions –if followed—would amount to a violation of Respondent's due process rights.

In *Lamar Central Outdoor* case 343 NLRB 261 (2004), a case where "In its exceptions, the General Counsel expand[ed] the theory of the violations beyond what was alleged in the complaint and litigated at the hearing", *Id.* at 9, expressed:

The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process in the Administrative Procedure Act. Under the Act, "persons entitled to notice of an

agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. Section 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Id.* (quoting *Rodale Press v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)).

In this case, the GC attempts to change its theory in midstream without giving Respondent reasonable notice. Worst, it wants a presumption to be imposed and a ruling that Respondent was unable to rebut the presumption without first being notified of its existence. Giving that this move by the GC constitutes an egregious violation of Respondent's due process rights, this argument in the alternative should be entertained.

In the alternative, the evidence presented at trial does not support the conclusion that Respondent refused to meet and bargain before the employees manifested their wish to not be represented by the Union. the GC's argument that the Respondent's engaged in an intentional delay to undermine the Union is simply grounded on broad misrepresentations of the factual record.

We have already demonstrated that Respondent did not delay the process of recognizing the Union. We now show that neither did it refuse to meet and bargain. First, as previously mentioned, from September 13, 2017 to February 7, 2018 the Union never asked to meet and bargain concerning the initial terms of collective bargaining agreement. It was not until February 7, that the Union first sent a letter to Respondent requesting bargaining. However, by this time the technical unit employees had already sent their letters expressing their wish not to be represented and Respondent had sent the February 5, letter advising the Union that it was withdrawing recognition from the technician unit. On that same date Respondent reiterated its

request of November 6, 2017 that the Union submit its proposals in writing. In said letter Respondent also stated that it would be available to coordinate the bargaining meetings once it had received and analyzed the Union's proposal. This letter does not constitute a refusal to bargain. As a matter of fact, the Union on February 12, 2018, accepted the Respondent's request and sent said proposals to Respondent. Just one day after, on February 13, 2018, the majority of the employees in the office clerical and medical technologist unit presented to Respondent letters notifying of their request to no longer be represented by the Union. (Rejected Exh. 4 and 6) On February 14, 2018, Respondent withdraw recognition from the Union as the representative of employees in the clerical workers unit. On that same date Respondent by separate letter confirmed the receipt of the Union's proposal and asserted that it would begin revising it and would submit counterproposals. On February 16, Respondent withdrew recognition of the Union as the representative of the medical technologist unit. By this date, we submit there had not been a refusal to bargain or meet by Respondent.

During March and April, 2018, Respondent was actively engaged in analyzing the Union's proposal and drafting the counter proposal, tasks that go to the heart of any negotiating process.

Also, it's important to note, as previously mentioned, that the ALJD did not base its findings of an 8(a)(5) unfair labor practice on the new theory expounded by GC but specifically only on the irrefutable bar established by the Board in the UGL UNICCO case. This not only in consideration of the prevailing doctrine, but on the fact that GC did not during trial present this new argument or theory.

There was simply not enough time between the alleged delay to meet and bargain and the time when the employees manifested their wish to no longer being represented by the Union. In fact, at least one withdrawal happened before the Union asked to meet and bargain. To apply the presumption of *Lee Lumber* under these circumstances, would be to extend another doctrine whose primary goal is not to protect an employee's Section 7 right to free choice of a union representation, but stability of a bargaining relationship, as is the case with the discredited successor bar.

- ii. The ALJ acted correctly when it rejected the GC's after the fact argument that Respondent delayed recognizing the Union and that said purported delay should be considered as reflecting on Respondent's pattern of Conduct.

The GC argues in Cross-Exception 4 that the ALJ failed to address that Respondent's delay in recognizing the Union should similarly be considered as reflecting on the Respondent's pattern of conduct. [ALJD 12: 33-41]. We have already debunked the premise behind this argument, to wit, that Respondent refused or delayed recognizing the Union. The fact that Respondent did not refuse or delay recognizing the Union is strengthened by the fact that the GC never alleged nor did the charging party file a charge accusing Respondent of refusing or delaying recognizing the Union. Neither did it request to amend the Charge during the proceedings. Last, the effects of Hurricane María cannot be ignored. The Hurricane hit the Island just three business days after Respondent became the successor of San Lucas. There was just not enough time for the new employer to prepare for what was eminently going to be the worst storm to hit the Island in over 100 years, issue payroll (see discussion in prior section and Jt. Exh. 14) and formally review all the employment acceptance letters. But despite these difficulties, Respondent informally informed the Union it had recognized it and, in accordance

Laws as stated in Article 6 has the responsibility of “selection, employments, control and discharge of employees of the corporation and the development and maintenance of employees, personnel, policies and practices” (See Jt. Exh. 77, Page 34, 6.3.2). The above mentioned rights and responsibilities of the Board of Directors of Hospital Menonita Guayama, Inc., and of its Administrator clearly demonstrate that there is no centralized control of labor relations. The allegation of GC that the employment policies of the corporation “are expected to be consistent with Mennonite General Hospital Inc’s personnel policies and idiosyncrasies” is misleading and not correct (See Jt. Exh. 77 Page. 16 3.23.19)

In view of the above, Respondent submits that there is no basis to determine that there exists a single employer relationship between Hospital Menonita Guayama Inc., and Mennonite General Hospital, Inc.

WHEREFORE Respondent requests that this Board deny the General Counsel’s Cross-Exceptions.

Respectfully submitted on October 23rd, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Respondent's Answering Brief in Opposition to General Counsel's Cross Exceptions has been sent on this same date by email to Unidad Laboral de Enfermeras(os) y Empleados de la Salud at presidente@unidadlaboral.com and its legal representative, Harold E. Hopkins, Jr., to his email snikpohh@yahoo.com and to Counsel for General Counsel, Celeste Hilerio Echevarría at her email address celeste.hilerio-echevarria@nlrb.gov.

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